2012 IL App (1st) 092246-U

FIRST DIVISION
March 30, 2012

No. 1-09-2246

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	01 CR 11676 (03)
	)	
SALVADOR PONCE,	)	Honorable
	)	James B. Linn,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
JUSTICES Karnezis and Rochford concurred in the judgment.

ORDER

HELD: We affirm the circuit court's order dismissing petitioner Salvador Ponce's amended postconviction petition at the second-stage of the post-conviction proceedings where he failed to make a substantial showing that he received ineffective assistance of counsel and he failed to establish a claim of actual innocence based on newly discovered evidence.

¶ 1 Petitioner, Salvador Ponce, appeals from a circuit court order dismissing his amended postconviction petition at the second-stage of the postconviction proceedings under the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)). For the reasons that follow, we affirm.

¶ 2 Following a bench trial, petitioner was convicted under an accountability theory of first-degree murder and aggravated battery with a firearm in connection with the gang-related shootings of Brian Zink and Edgar Segovia. Zink died from his gunshot wounds. Petitioner was sentenced to consecutive prison terms of 20 years for first-degree murder and 6 years for aggravated battery with a firearm.

¶ 3 On direct appeal we affirmed petitioner's convictions and sentences. *People v. Ponce*, No. 1-03-0060 (June 2, 2004) (unpublished order under Supreme Court Rule 23). We determined that although petitioner's arrest was illegal, his post-arrest statement to police was sufficiently attenuated from the arrest to be purged of any taint. *Id*.

¶ 4 Petitioner filed a *pro se* petition for postconviction relief alleging various constitutional challenges to his convictions. Petitioner's petition was later amended by appointed counsel.

¶ 5 In his amended postconviction petition, petitioner alleged that his trial counsel had been ineffective for: (1) failing to call his brother and sister as witnesses during the hearing on his motion to suppress statements where they would have testified that they observed signs of police brutality on petitioner at the police station shortly after he gave his inculpatory statement to the prosecutor and where their testimony would have corroborated petitioner's claim that his statement was the result of police coercion; (2) failing to investigate, interview, and present eyewitness testimony from his

codefendants and another witness who could have testified concerning his actual innocence; and (3) refusing to allow him to exercise his right to testify at trial in his own defense.

¶ 6 After hearing arguments on the State's oral motion to dismiss the amended postconviction petition, the trial court dismissed the petition at the second-stage of the postconviction proceeding. Petitioner now appeals. We affirm.

¶ 7 ANALYSIS

¶ 8 The Illinois Post-Conviction Hearing Act (Act) provides a procedure by which an imprisoned criminal defendant can collaterally attack his conviction or sentence based upon a substantial denial of his federal or state constitutional rights. *People v. Tenner*, 175 Ill. 2d 372, 377 (1997); *People v. Haynes*, 192 Ill. 2d 437, 464 (2000). The Act provides defendants the opportunity to present claims that were either neglected on direct appeal or based on matters outside the record. *People v. Chatman*, 357 Ill. App. 3d 695, 698 (2005).

¶ 9 A post-conviction proceeding not involving the death penalty is divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Petitioner's petition was dismissed at the second-stage of the postconviction process.

¶ 10 To survive dismissal at the second-stage, the petition and supporting documentation must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). At this stage, all well-pled facts in the petition are taken as true unless positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 11 In determining whether a defendant was denied the effective assistance of counsel, we apply

the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel.

¶ 12 Petitioner's first claim of ineffective assistance of counsel relates to counsel's alleged failure to call petitioner's brother, Joe Macias, and his sister, Rachel Roman, as witnesses during the hearing on his motion to suppress statements where they would have allegedly testified that they observed signs of police brutality on petitioner at the police station shortly after he had given his inculpatory statement to the prosecutor. Petitioner maintains that his siblings' testimony would have corroborated his claim that his statement was the result of physical coercion by the police.

¶ 13 A defense counsel's decision on whether to call a particular witness is generally viewed as a matter of trial strategy which cannot support a claim of ineffective assistance of counsel. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989). Upon review of the record, we cannot say that trial counsel's supposed failure to call Joe Macias and Rachel Roman as witnesses at the suppression hearing was so unreasonable or prejudicial as to result in ineffective assistance of counsel.

¶ 14 Joe Macias and Rachel Roman were petitioner's siblings, and as such, their credibility carried little weight. See *People v. Delony*, 341 Ill. App. 3d 621, 635 (2003) (rejecting claim that alleged failure to call proposed alibi witnesses constituted ineffective assistance where the witnesses were cousins of the defendant, and as such, their credibility may have carried little weight).

¶ 15 Moreover, a review of Joe Macias' affidavit indicates that his proposed testimony would have been irrelevant because it would not have corroborated petitioner's claim that his inculpatory statement was the result of a physical beating by the police. In his affidavit, Joe Macias stated that when he bonded the petitioner out of the police station on April 6, 2001, petitioner was in sound health and had no visible bruises. Joe Macias never stated that he observed any physical injuries to the petitioner.

¶ 16 Likewise, Rachel Roman's affidavit does not support petitioner's position because her affidavit was rebutted by the record. In reviewing the dismissal of a postconviction petition at the second-stage of a post-conviction proceeding, all well-pled facts in the petition and supporting affidavits are to be taken as true unless positively rebutted by the record. *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007); *Pendleton*, 223 Ill. 2d at 473.

¶ 17 In her affidavit, Rachel Roman stated that on April 6, 2001, she went to the police station and spoke with the petitioner prior to his being charged. Rachel Roman stated that when she asked petitioner how he was doing, he appeared very scared and started to cry, and responded that the police were slapping and threatening him. Petitioner also responded, contrary to his statement, that he had not been given anything to eat since his arrest.

¶ 18 However, Rachel Roman's attestation in her affidavit that she spoke with the petitioner at the police station on April 6, 2001, was contradicted by lockup records revealing that she actually visited petitioner on April 7, 2001, from 11:25 a.m. to 12:05 p.m. in the afternoon, several hours after petitioner had made his written statement. The record shows that petitioner gave his statement at approximately 3:35 a.m. on April 7, 2001.

¶ 19 If the petitioner had sustained the physical bruising he claims he received from the police prior to giving his statement, then its logical to assume that such bruising would have been evident to Rachel Roman when she visited petitioner in the lockup only hours after he had given his statement. However, nowhere in her affidavit did Rachel Roman ever state that she observed physical bruising or injuries on the petitioner.

¶ 20 In further support of his contention that evidence existed of his physical injuries, petitioner points to an alleged photograph of himself he claims was taken after his police interrogation. Petitioner claims that the post-interrogation photograph depicts the physical bruises he suffered at the hands of the police. Petitioner maintains that the photograph was produced at his pre-trial hearing.

¶ 21 A review of the record shows that no post-interrogation photographs of the petitioner were introduced during any of the hearings on his motion to suppress statements or motion to quash arrest and suppress evidence. Post-conviction counsel contends that Exhibit B is a custodial photograph of the petitioner showing him with a swollen lip.

¶ 22 However, a review of the photograph reveals only an unidentifiable black silhouette of a person against a lighter background. Petitioner failed to produce any physical evidence depicting himself with an alleged "busted lip and mark on the bridge of [his] nose which [he] got from being struck in the police station."

¶ 23 In this case, petitioner has not demonstrated that there is a reasonable probability that the trial court would have granted his motion to suppress his statements had his siblings testified at the hearing and therefore, we cannot say that trial counsel was ineffective in failing to call the siblings

to testify at the hearing.

¶ 24 Petitioner next contends that trial counsel was ineffective for failing to investigate, interview, and call as witnesses at his trial, codefendants Juan Villalobos and Jerry Medina, as well as Cristina Flores. Petitioner contends that the affidavits of Juan Villalobos and Jerry Medina indicate that they would have given testimony supporting his claim that he had no knowledge that Villalobos was armed with a firearm. He maintains that Cristina Flores' affidavit indicates that she would have testified that she did not recall hearing petitioner say anything about a gun.

¶ 25 "An affidavit must not only identify the source and character of the evidence, it must also identify the availability of the alleged evidence." *People v. Brown*, 371 Ill. App. 3d 972, 982 (2007). In this case, a review of the record indicates that Juan Villalobos, Jerry Medina, and Cristina Flores would not have been available to testify on petitioner's behalf at his trial.

¶ 26 At his own trial, Jerry Medina invoked his fifth amendment right against self-incrimination and declined to testify on his own behalf. The trial court found Medina guilty of aggravated battery as a lesser-included offense of murder. Medina's invocation of his fifth amendment privilege against self-incrimination at his own trial supports the inference that he would not have chosen to waive this privilege and make himself available to testify on petitioner's behalf.

¶ 27 In granting the State's motion dismissing the amended postconviction petition, the trial court recognized the unavailability of codefendants Medina and Villalobos stating that the "[f]ailure to call co-defendants is a Fifth Amendment right that co-defendants had and that was not going to happen without the consent of the lawyers and I can say that the likelihood of that is almost none whatsoever if not none. This is totally outside the realm of this Court's experience in these types of situations."

¶ 28 Cristina Flores was also unavailable to testify on petitioner's behalf, because at the time of his trial she was stationed out of the country as a member of the United States military. The record shows that after the trial court denied petitioner's motion to quash arrest and suppress evidence, defense counsel informed the court that Cristina Flores was in the armed forces. Defense counsel stated that he had not had a chance to personally interview Cristina Flores so he did not know what her trial testimony would be, but that he was aware of what she had told police about the incident.

¶ 29 The trial court responded that it was not inclined to continue the case, but would allow a stipulation as to Cristina Flores' testimony. Thus, defense counsel had to make a strategic decision whether to stipulate to Cristina Flores' testimony based upon her affidavit.

¶ 30 We believe defense counsel's decision not to agree to such a stipulation was sound trial strategy. A review of the record reveals that Cristina Flores' statements in her affidavit could have been more prejudicial to petitioner's case than potentially helpful.

¶ 31 In her affidavit, Cristina Flores stated that the petitioner and Medina confronted the victims as they sat in their SUV at a gas station. She stated that after she heard the gun shots she ducked, and petitioner and Medina returned to their vehicle. Contrary to petitioner's claims, Cristina Flores did not state that she did not remember hearing petitioner say anything about a gun, rather, she stated, "I don't remember them saying anything about what had happened." Defense counsel's decision not to agree to a stipulation of Cristina Flores' testimony based upon her affidavit, fell within the realm of reasonable trial strategy.

¶ 32 Petitioner finally contends that if we conclude that the witnesses who provided the affidavits were unavailable to testify on his behalf, then we should find that the information contained in those

affidavits constitutes newly discovered evidence of his actual innocence. Petitioner claims that his newly discovered evidence of actual innocence warrants an evidentiary hearing under the Act. We must disagree.

¶ 33 In order for a defendant to obtain postconviction relief under the theory of newly discovered evidence, defendant must establish that the evidence is "newly discovered" in that: (1) it was not available at defendant's original trial and could not have been discovered sooner through diligence; (2) it is material and noncumulative; and (3) it is of such conclusive character that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004); *People v. Anderson*, 375 Ill. App. 3d 990, 1006 (2007). In our view, none of the information contained in the affidavits qualifies as newly discovered evidence which could not have previously been obtained sooner through diligence and which is material evidence of petitioner's actual innocence.

¶ 34 In sum, we conclude that the petitioner has failed to make a substantial showing that his trial counsel was deficient or that he was prejudiced by any perceived deficiencies of counsel. Petitioner's claim that he received ineffective assistance of counsel was properly dismissed without an evidentiary hearing. Accordingly, we affirm the trial court's order dismissing petitioner's amended postconviction petition.

¶ 35 Affirmed.